PRIVILEGED AND CONFIDENTIAL

SOME ADDITIONAL THOUGHTS

Philip Morris wants to reevaluate its historic position on smoking and health in three different venues: 1) public statements which its executives and spokesmen make, 2) legislative and 3) litigation. The overriding admonition is that nothing said can adversely affect our litigation position.

The desire to reevaluate arises from a general concern, heightened by the publicity from the recent Cipollone case, that the historical position is no longer credible and therefore, the industry is not credible and is constantly losing respect with Congress and the public. There is a desire to create a more favorable climate for the industry and cigarette smoking in society. If we do not stem the adverse tide, so this argument goes, society will be so poisoned against cigarette smoking that we will find it impossible to win cases and worse, we will be legislated into a cottage industry supported by 10,000,000 smokers who are permitted to smoke only in their own homes and then only if no non-smoking member of the family or guest is present. Bill Murray

has listed as the goals of a change: 1) creating a better atmosphere for product liability litigation; 2) avoidance of punitive legislation in the form of increased taxes, revocation of the preemption protection, relegation to FDA jurisdiction and tougher legislation relating to environmental tobacco smoke. Even these focus squarely on making the industry more credible and creating a more favorable climate for smoking within our society.

What could executives say in public without adversely affecting the litigation? They could say that for purposes of doing something (yet to be discussed), they are willing to assume that what the Surgeon General says about cigarette smoking and chronic disease is appropriate; further, that they recognize his position as one warranted by public health concerns and, therefore, reasonable. The emphasis here, as Tom Silfen points out, is on the position that it makes no difference what the company believes as long as it does the "right" thing. Therefore, for purposes of taking action in the public forum, the industry is willing to assume that all appropriate actions should be taken on the public

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health level. For purposes of the litigation, the industry is not willing to concede anything.

In the litigation venue, we will require plaintiffs to prove causation both legally and scientifically. The problems with this position are obvious: 1) it sounds duplicative -- on the one hand in order to get more favorable legislation or create a better environment for ourselves, we take one position, on the other, we intend to play hardball with the "victims" of cigarette smoking when they press their claims in the courtroom. This is the industry's ultimate public relations sham; 2) our position continues to mislead the public -- with a wink. The information environment is further confused with our dual positions and the public is still not being fully informed as long as the company continues to defend cases on the basis of causation.

Another alternative is for the executives to say that smoking poses a risk (risk factor?) for the smoker. Upon further probing, the executives could say that the risk is established by the epidemiological studies (in the absence of which there would be no risk) which raise the possibility

that cigarette smoking causes chronic disease. Because of the problems inherent in such studies, they do not scientifically prove causation. The problem with this approach is also readily apparent-- it doesn't say anything more than what we say now it just seems on its face to be a concession.

The issue is most sharply focused when a company or industry representative is directly asked "Does cigarette smoking cause lung cancer?" Under both scenarios, the respondent must shift the emphasis of the question away from what we believe (for the true measure of our belief will always be what our litigation position is) to what we have done. It is here that the tension Tom Silfen talks about comes into play. In order to satisfy the persistent interrogator, we must have something to point to as a voluntary action on the part of the industry or we receive no credit and, consequently, do not improve our image in the minds of public health officials and the public at large. Yet to do anything voluntarily could constitute an admission for use against us in the litigation and form the basis for a minimal level of legislation. Further, legislation could in turn all but put the industry out of business, e.g.

FDA regulation, abolishment of preemption, enormous taxes, complete ban on advertising, limited distribution, limitations on ingredients, even further restrictions on where and when people can smoke.

First, what actions could we publicly embrace that are 1) susceptible to public acclaim, 2) consistent with long-time industry positions and, therefore, would not hinder our litigation position, and 3) would not require legislative intervention and hence avoid the tension?

1. Adult Use

a. A ban on possession of cigarettes by those 18 years or younger.

b. no further sampling.

c. ban on vending machine sales.

d. no advertising or promotion within a certain distance of schools or other youth-oriented locations. We could take almost any action directed at youth smoking without being

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inconsistent with our long-stated position that "smoking is an adult custom" and without adversely affecting our litigation position.

2. Advertising and Promotion -- No further "issue" advertising and no further promotion at music and sporting events. These things drive the critics wild and are perhaps not that advantageous to the industry. The latter, it is claimed, most directly affects youth. These actions require us to stop doing things, lower the industry's profile and, consequently, reduce the heat of the debate. Image advertising raises a far more difficult issue and remains for further discussion.

No

3. Research -- An announced commitment to much more research directed at smoking, the smoker and environmental tobacco smoke. This should be in addition to the commitment to CTR and other current industry and company research commitments. The research would be specifically directed to all phases of cancer including, but not limited to, research involving: smoking,

Yes

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the smoker, the cigarette and environmental tobacco smoke. It would have to be controlled and directed by a totally independent group, e.g. National Cancer Institute, Sloan-Kettering, Mayo, M.D. Anderson and would not be used by the industry for public relations programs. It is even conceivable that the program would be put in place without any industry announcement but rather let such an enormous commitment find its own way into the public awareness as such a commitment surely would do. This sounds strangely familiar and the industry would have to brace itself for the howls from the critics that would surely follow: more of the same industry obsfucation; we already know that smoking causes lung cancer, etc.; and this is yet another effort to mislead the public into believing that the real answer has yet to be found. But there would be a difference -- 1) the amount of the commitment would be larger than ever before, 2) there would be no industry involvement except for requested technical assistance, 3) there would be no industry p.r., 4) the scope of the investigation would be much broader. The structure of this commitment, the

goals, in fact the entire program obviously must be more carefully thought through but it should be one of the main topics for further detailed discussion.

Second, what might we do that 1) we have not done before, 2) is not in keeping with long-time industry positions (and, therefore, the litigation ramifications are not so clear) and 3) does not require legislative intervention?

1. Ingredients -- The logic of the critics is superficial but compelling to the public. Why not reveal the ingredients? Doesn't the public have the "right to know" in order to make a fully informed choice? Therefore, publicly reveal the most often used ingredients in cigarettes. This sounds shocking at first blush. But could it be done so as to put the ingredients in "proper and acceptable" perspective? How do these ingredients compare with ingredients people come into contact with every day? Are they really that different in substance and amount? Isn't this consistent with the industry's posi-

tion that the public knows or should know everything? Wouldn't this <u>really</u> disarm the critics?

2. <u>A Frank Statement</u> -- Full-disclosure of all that has been said about cigarette smoking. We believe the public is fully informed and, therefore, fully aware of everything that has been said about cigarette smoking, the most discussed scientific issue of the past 35 years <u>but</u> just to make sure, here it is from the tobacco industry.

a. All Surgeon General Statements.

b. Statements from the ACS, AMA, etc.

c. The warning labels -- 1966, 1970, 1984.

d. The list of ingredients.

e. The industry's position explained.

Troublesome questions follow in abundance. 1) Is this an admission that perhaps the public hasn't been fully informed? 2) Was Congress misled in the

past and hence the industry should not be protected through preemption? 3) Would the industry object to similar information being put in package inserts, as will soon be done in Canada? 4) Will the industry agree to putting such information in packages sold abroad (foreign warnings)? The answers are not readily apparent but the questions should be on the table as our discussions continue.

The industry is heading down a steep slope at an ever increasing speed. There is a real chance that the litigation will be successfully defended yet the industry will lose because the public will find smoking unacceptable and the industry to be without a conscience and, therefore, unacceptable as a participant, on any major scale, in our society. This short memorandum is designed to supplement the excellent memo of Tom Silfen. Tom's memo incorporates, with many of his own thoughtful ideas, the nature of our discussion to date. My emphasis is on what the industry might do outside of legislation with two primary goals in mind: 1) make the industry and its position responsive to the concerns of today's society and 2) enable the industry to successfully defend what we all believe are non-meritorious law-

suits. I do not mean to downplay the role of legislation nor the very difficult questions posed in that context.